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No. 85-1606

In the Supreme Court

OF THE

United States

October Term, 1985

WHALERS' VILLAGE CLUB,
Appellant,
vs.
CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal from the Supreme Court of California

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

I

UNLESS THIS COURT REVIEWS THIS CASE ON ITS MERITS CALIFORNIA GOVERNMENTS WILL CONCLUDE THERE IS NO CONSTITUTIONAL TAKING ISSUE POSED WHEN GOVERNMENT APPENDS ANY DEDICATION REQUIREMENT TO ANY PERMIT UNDER ANY CIRCUMSTANCE IF THE PERMIT IS WITHIN THE POLICE POWER OF THE STATE.

The Commission's Motion to Dismiss sets forth an additional compelling reason why this is an important case that should be reviewed on its merits. The Commission, through its lawyer, the Attorney General, asserts that this Court's prior actions have approved the California practice of holding constitutional *all* dedication requirements appended as conditions to any permit for any act determined to be a new development. Further, the

Attorney General also states that this Court has approved the principle that dedication requirements are not dependent upon a factual showing the development created the need for the requirement. The Attorney General concludes that this case attacks principles of constitutional law uniformly applied in California for 35 years and concurred in by this Court. (Motion to Dismiss, p.6.)

The Attorney General is the legal advisor of each department of the State in all matters relating to its powers and duties. CAL. GOVERNMENT CODE § 11157 (West 1980). If this Court does not accept this case, the Attorney General will continue to advise all California departments that they may constitutionally append any type of dedication requirement to any permit irrespective of the character of the government action, the reasonable economic expectations created in the permittee by prior government actions, or whether the development creates the need for the dedication. For all practical purposes this all-encompassing doctrine could signal the end of the right of exclusive possession for California property owners.

The Attorney General bases these broad conclusions upon this Court's dismissal of appeals in two prior cases. In 1971, this Court dismissed for want of a substantial federal question a case presenting the narrow issue of whether government may require a subdivider of raw land to dedicate sufficient park space or in-lieu fees to meet the needs of future residents of the subdivision although the public also could use the park facilities. *Associated Home Builders, Inc. v. City of Walnut Creek*, 404 Cal.3d 633, 484 P.2d 606, 94 Cal.Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971).

In 1985, this Court dismissed for lack of a substantial federal question a case involving the issue of whether the California legislature could constitutionally compromise and settle a dispute by enacting a law allowing a landowner to build on his lot if he agreed to put $5,000 into an

in-lieu fund to be used to acquire beach access located elsewhere in the subdivision. *Remmenga v. California Coastal Commission*, 163 Cal.App.3d 623, 209 Cal.Rptr. 628, *appeal dismissed*, ____ U.S. ____, 106 S.Ct. 241, *reh'g denied*, ____ U.S. ____, 106 S.Ct. 548 (1985).

It is inappropriate to conclude from the dismissal of these two cases that this Court has approved a government's appending *any* conditions it wishes to *any* permit under *any* circumstances for *any* permit request falling within the State's police power. Nevertheless, the Attorney General has set forth such a conclusion in the Motion to Dismiss. The Attorney General will construe a dismissal of this case as an affirmance of that position and so advise all California departments.

II

THIS CASE IS PROPERLY BEFORE THIS COURT UNDER 28 U.S.C. § 1257(2)

The validity of a state statute is said to have been "sustained" within the meaning of 28 U.S.C. § 1257(2) (1986) when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 288-90 (1921); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-41 (1979); *Cohen v. California*, 403 U.S. 15, 17-18 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 61 n.3 (1963); cf. *United States v. Knox*, 396 U.S. 77, 79 n. 2 (1969).

Throughout this lawsuit the Homeowners repeatedly presented to the state courts their contention that the Commission's statutory construction of the Coastal Act under the circumstances of this case rendered the imposition of the offending conditions unconstitutional under federal law. The Commission acknowledges that the Homeowners challenged the constitutional validity of spe-

cific provisions of the Coastal Act in the First Amended Petition for Writ of Mandate. (Motion to Dismiss, p.11.) In the court of appeal, the Homeowners also contended that "the Commission's interpretation of [relevant Coastal Act provisions] rendered them unconstitutional as applied." (Respondent's Brief to California Court of Appeal, Second Appellate District, p.27.) Contrary to the Commission's assertion (Motion to Dismiss, p.11), the Homeowners raised the federal constitutionality of relevant Coastal Act provisions as construed by the Commission and the court of appeal both on their face and as applied to the facts of this case when seeking review from the California Supreme Court. (Petition For Review to California Supreme Court, p.17.)

Without citation, the Commission incorrectly states that since a challenge to the constitutional validity of specific provisions of the Coastal Act "was never the basis for the decision of the state appellate court" (Motion to Dismiss, p.11), the appeal should be dismissed or review denied.

The court of appeal specifically acknowledged that the Homeowners contend CAL. PUBLIC RESOURCES CODE § 30212 (West 1986) is unconstitutional as applied. The Court expressly disagreed. (CA, p.16.)

Even had the court of appeal ignored the federal grounds presented to it, this appeal should not be dismissed. An appeal under Section 1257(2) will lie even though the state court is not explicit in overruling a timely challenge on federal grounds to the validity of the state statute. See *Largent v. Texas*, 318 U.S. 418 (1943). So long as the statute is sustained, the state court has necessarily rejected the objection. The state court's silence cannot destroy the right to appeal under Section 1257(2). An erroneous failure to pass on the federal constitutional objections to the state statute is treated as equivalent to a finding of validity within the meaning of

Section 1257(2), so that an appeal will lie. *Lawrence v. State Tax Commission*, 286 U.S. 276, 282-83 (1932).

In any event, the Jurisdictional Statement so clearly raises issues of federal constitutional dimensions that even if this case were not within the provisions of Section 1257(2), review should be granted by this Court under the provisions of 28 U.S.C. § 2103 (1982).

III

THE MOTION TO DISMISS CONTAINS SEVERAL INACCURATE OR MISLEADING STATEMENTS AND CONCLUSIONS.

The Commission attempts to distinguish *Sederquist v. City of Tiburon*, 765 F.2d 756 (9th Cir. 1984) from this case on the ground the fundamental property right involved in *Sederquist* was the landowner's right to make economic use of the property rather than the right of exclusive possession. (Motion to Dismiss, pp.9-10.) The Commission misses the point. *Sederquist* was cited in the Jurisdictional Statement for the proposition that the Ninth Circuit does not agree with the court of appeal that a landowner's "triggering" an invasion of fundamental property rights by requesting a permit renders inapplicable the principles of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). For this purpose it does not matter which fundamental property right has been invaded by the government's action.

Simple logic demonstrates the Ninth Circuit rather than the California view is correct. If the California exception were valid it is difficult to visualize any situation where the invasion of a California landowner's fundamental property right of exclusive possession could ever constitute a taking. *Agins v. City of Tiburon* 447 U.S. 255 (1980) provides that a California landowner must first apply for a permit before raising Fifth and Fourteenth

Amendment rights against a taking. Now the court of appeal opinion states that a landowner's application for a permit "triggers" an exception to the rule that an invasion of the right to exclusive possession can constitute a taking. In combination, the principles of *Agins* and the court of appeal opinion make it procedurally impossible for a California landowner ever to raise the principles set forth by this Court in *Kaiser Aetna* and *Loretto*.

The Commission argues that the Homeowners' position amounts to an assertion that government can never require dedication in exchange for development approval. (Motion to Dismiss, p.10.) This argument is hyperbolic. Subdividers of raw land seldom have reasonable economic expectations created by prior government actions that street dedications, sidewalk and bicycle path dedications, park and open space dedications, school fee requirements, parking requirements, etc., will not be required in exchange for development approval.[1] Owners of lots and homes often, but not always, have such reasonable expectations depending upon prior governmental actions with respect to their property. The character of the government action also varies with the nature of the request being made of government by the property owner and the nature of the invasion imposed by government.

The Commission states California law now recognizes "an ability to subsequently challenge conditions where acceptance of the permit occurs under exigent circumstances." (Motion to Dismiss, p.4 n.3.) The case cited for this proposition was decided in 1983, several years after the homeowners of Whalers' Village placed rocks under their homes. California law in 1980 and 1981, as indicated

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[1]But see *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir. 1983) for a fact situation where a subdivider did have such expectations. Under the California interpretation of *Agins* and the Court of Appeal decision in this case, the Ninth Circuit decision in *Martino* is incorrect.

in the Homeowners' Jurisdictional Statement, foreclosed such a possibility. (Jurisdictional Statement, p.6 n.2.)

The Commission argues that the principles of *Kaiser Aetna* and *Loretto* are not applicable to this case and that the opinion of the court below comports with this Court's decision in *Agins v. Tiburon*, 447 U.S. 255 (1980). (Motion to Dismiss, pp.7-9.) The Commission quotes language in *Agins* to the effect that a general zoning law effects a taking if it denies an owner economically viable use of his land (Motion to Dismiss, p.9.) The implication drawn from this language in *Agins* is that a law extinguishing another fundamental attribute of ownership such as the right to exclusive possession would not constitute a taking and therefore the court of appeal's opinion comports with *Agins*.

The Commission misreads *Agins*. *Agins* directly states that, although the Tiburon ordinances in question limited development, "they neither prevent the best use of appellants' land . . . *nor extinguish a fundamental attribute of ownership, see Kaiser Aetna v. United States. . . .*" *Agins*, 447 U.S. at 262 (citation omitted) (emphasis added).

CONCLUSION

When the Homeowners of Whalers' Village saw the damage done to their unprotected beachfront homes as a result of unusual storms at sea, they realized that some protective device was needed to prevent those homes from later possible destruction. When they tried to comply with the California Coastal Act by seeking from the California Coastal Commission permission to protect those homes in a manner suggested by professional engineers, the Homeowners were told that the price of that protection was ceding for public use and recreation their exclusive right to use the beach portion of the property from the property line up to the homes themselves. The Homeowners believed their federal constitutional rights

in property were threatened and that they had a right to a full judicial review of the Commission's application of the Coastal Act. They ran a risk because of these beliefs and acted to protect their homes with a rock revetment. They were sued for civil fines and penalties, punitive damages and an injunction to remove their revetment. They were subjected to a California appellate review process which gives only lip service to individuals' rights in property. The Homeowners believe in the idea expressed by this Court in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Not only are property rights expressly protected by the Constitution, but a fundamental interdependence exists between them and the other personal rights protected by the Bill of Rights; "[n]either could have meaning without the other." *Id.* at 552. A government which exercises the disguised but unrestrained power to deprive citizens of lawfully accumulated property and threatens the day-to-day security of their families, has little need for overt invasions of other apparently protected rights. The Homeowners look to this Court to protect those rights by reminding California governments and courts of the limits of governmental power.

For these reasons, this Court should deny the Motion to Dismiss and note probable jurisdiction of this appeal.

Respectfully submitted,

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May 1, 1986

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On May 1, 1986, I served the within Appellants Reply Brief in re: "Whalers' Village Club v. California Coastal Commission" in the United States Supreme Court, October Term 1985, No. 85-1606;

on the parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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Hon. Robert J. Soares, Judge

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on May 1, 1986, at Los Angeles, California

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